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Supreme Court of The United States

OCTOBER TERM, 1962

No. 63

BARBARA D. FORD,

Petitioner

Against

HERMAN A. FORD,

Respondent

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The several particulars in which respondent's argument, labeled "STATEMENT OF THE CASE" (pp. 1-9), and brief in general contain distortions of fact as well as burdensome and irrelevant matter are so apparent as to hardly require the filing of a reply brief. However, a reply brief may be necessitated by that portion of respondent's argument based upon matter extraneous to the record, which is appended to his brief without effort to comply with the Rules of this Court; thus brief reference will also be made to some of the most striking inaccuracies, and to respondent's belated further argument that certiorari was improvidently granted.

I

The Respondent Has Disregarded The Rules And Orders Of This Court.

In the "Question Presented" at page 1 of his brief, and repeatedly thereafter the respondent states that the order of the Virginia court was requested by counsel for both parties; and at page 4, footnote 1, it is stated that the joint motion of counsel requesting its entry was erroneously ommitted in printing the Transcript of Record. We note that counsel did not move under Rule 36 (6) of this Court to correct the record, nor do they indicate that the portion of the printed Transcript of Record in which the order is embodied was printed at their direction in preparing the record on appeal to the South Carolina Supreme Court. In any event, however, the petitioner has never contended that the order of dismissal was not entered by consent of both attorneys, and this point upon which counsel for the respondent lay such great stress is completely without significance.

In their "STATEMENT OF THE CASE" at pages 7-9, and "ARGUMENT" at pages 13, 14, and 25 counsel for respondent refer to a proceeding which respondent initiated in North Carolina, and appended to their brief at pages 27-76 is a purported record of the proceedings therein. Here again counsel have argued and appended the matter wholly outside the record, and even if it could have been properly added under Rule 26 (5) or any other Rule of this Court, which is doubtful, the respondent made no effort to do so. Of greater importance, however, is that counsel for the respondent have invited attention to the fact that they have urged and succeeded in obtaining the issuance of a custody decree after this Court had acquired jurisdiction of the persons and of the subject matter by the order of Mr. Justice Frankfurter, filed December 22, 1961 and set forth in the appendix hereto, and the order of this Court allowing certiorari, filed February 26, 1962. As indicated at pages 27-34 in the appendix to his brief, Herman Ford instituted an action for divorce and for

custody of the children, in the Superior Court for Lee County, North Carolina, by service of summons on December 21, 1960, thirteen days after the issuance of the order of the Juvenile and Domestic Relations Court of Greenville County, South Carolina granting custody to Barbara Ford. By her attorneys Barbara Ford appeared specially for the purpose of making a motion to dismiss the action insofar as it related to custody (Resp's. Br. 34, 35), but the Judge of the Superior Court ruled that the motion was properly a matter for determination on the trial of the action (Resp's. Br. 36). Herman Ford thereafter amended his complaint by adding a second cause for divorce upon the ground of two years separation (Resp's. Br. 60, 61), to which Barbara Ford, by her answer to the amended complaint, agreed (Resp's. Br. 62, 63); but as the respondent did not withdraw his first alleged cause or ground, *i.e.* adultery, it was necessary that the divorce action be set for jury trial as a contested case. The action for divorce came on for trial on August 6, 1962, and the divorce was granted upon the second ground (two years separation) only. The trial judge then set the hearing on respondent's motion for custody immediately upon the conclusion of the jury trials, despite the prior order of Mr. Justice Frankfurter and order of this Court granting certiorari.

The respondent neglected to append to his brief the transcript of the proceedings at this hearing, and the order of the Judge of the Superior Court does not recite that counsel for Barbara Ford renewed their motion to dismiss, offering in support thereof the aforementioned orders of this Court. The motion was denied and the Judge of Superior Court awarded custody to Herman Ford. The enforcement of the judgment was suspended, however, by summary order of the Chief Justice of the Supreme Court of North Carolina, requiring Herman Ford to "abide by the terms of the Order of the Court of Common Pleas of Greenville County, Greenville, South Carolina as directed by the December 22, 1961 Order of the Honorable Felix Frankfurter, ***" (Resp's. Br. 75); thus the necessity of application to this Court for an injunc-

tion in protection of jurisdiction, or other appropriate remedy, was obviated.

II

Respondent's Brief Contains Unsupported Statements Of Fact, Erroneous References To The Record, Citations Of Authority Quoted Out Of Context, And Burdensome And Irrelevant Matter.

In respondent's "STATEMENT OF THE CASE" it is stated:

> "From the conversation Respondent correctly inferred that Petitioner had returned to North Carolina to get the three children. (R. 73-74) Being apprehensive, Respondent then arranged by telephone for the children to be moved to Fayetteville, North Carolina in the company of the parties' German maid, where they were promptly joined by Respondent and his mother. (R. 156, 163) However, Petitioner, accompanied by her sister, discovered the whereabouts of the children in Fayetteville, and the next morning—immediately after Respondent had left for his office in Sanford—took the children and drove off with them to Richmond over the protestations of Respondent's mother. (R. 17, 73-74, 96, 163)"

As appears from the record the respondent should have "correctly inferred" that Barbara Ford was returning to North Carolina when she asked him if he would drive her and upon his refusal told him that she would take the train (R. 73). The respondent must already have been "apprehensive" as he had, by his own testimony, secretly called and had the children taken from their home as soon as he arrived in Richmond (R. 155). The last sentence of the above quotation from the respondent's brief is not supported by the evidence as the only place in the record where this appears is at R. 17, where the unsubstantiated allegations of respondent's petition for writ of habeas corpus are set forth.

Curiously, after stating that the petitioner took the chil-

dren and drove off to Richmond over the protestations of respondent's mother, respondent states at page 13 of his brief that the petitioner "clandestinely" removed the children, not adding, of course, that he, himself, had first sent the children from their home to an unnamed friend's house and thence to the motel in Fayetteville without advising the petitioner or her confidants (R. 155). This would indicate that the respondent may have a misconception of the definition of the word "clandestine", or at least as to whose actions the word should apply.

Similarly, at page 16 of his brief, the respondent indicates a misconception of the import of the word, "reported". The Judge of the Juvenile and Domestic Relations Court made the express finding, based upon the admission of counsel for the respondent, that the custody agreement of the parties "was never shown to that (Virginia) Court" (R. 25); and counsel for respondent, although by implication denying this fact in the text of their brief (Resp's. Br. 15), admit in footnote 14 at page 15 that the agreement "was not, in fact, revealed to the Virginia court ***". Counsel state, however, that "reported" and "revealed" are not synonymous (Resp's. Br. 16), and that:

> "*** upon representation of this agreement and upon motion of *both parties*, the case was dismissed by the Virginia Court."

According to *Websters New International Dictionary*, Second Edition, the word "reveal" is synonymous with the words "disclose" and "divulge"; the word "report" is synonymous with the words "narration" and "recital"; and the word "representation" is synonymous with the words "show" and "depiction". We, therefore, agree with counsel for respondent that "reported" and "revealed" are not synonymous, but challenge them to substantiate their above quoted assertion that "upon representation" of the agreement and motion the case was dismissed, or to explain how the agreement could have been represented, *i.e.*, shown or depicted, to the Virginia court when the South Carolina Judge made the finding, to which

counsel did not except, that it was not shown to the Virginia court and when, by the footnote admission in their brief, it was not revealed, *i.e.*, disclosed or divulged, to the Virginia court.

At page 19 the respondent cites and quotes (with usual added emphasis) the Virginia court in *Campbell v. Campbell* 203 Va. 61, 64, 122 S.E. 2d 658, 661 (1961), as authority for his contention that a prior custody decree "can be altered only where *subsequent* facts would so dictate." In that case the Virginia court, after referring to section 20-108, Code of 1950, 1960 Replacement Volume, said:

> "* * * and if in the future conditions materially change effecting the welfare of the children the court has the authority to change or modify the decree at any time to meet the changed conditions."

By the express language of the section to which the court referred[1], the court has unlimited power to modify its decrees "as the circumstances of the parents and the benefit of the children may require". As stated by the court in *Campbell v. Campbell, supra*, if the future conditions materially change affecting the welfare of the children the court could modify its decree to meet the changed condition; but it would be incredible if the court could not also modify its "decree" upon subsequently being apprised of the contents of the private agreement of the parties and, after full hearings, determining that its former "decree" was not in the best welfare of the children.

The cases of *Semmes v. Semmes* 201 Va. 117, 109 S.E. 2d 545 (1959) and *Andrews v. Geyer* 200 Va 107, 104 S.E. 2d 747 (1958), cited and discussed at pages 19-21 of respondent's brief, are both clearly distinguishable from the

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[1] Section 20-108, Code of 1950, 1960 Replacement Volume:

"The court may, from time to time after decreeing as provided in the preceding section, on petition of either of the parents, or on its own motion or upon petition of any probation officer or superintendent of public welfare, which petition shall set forth the reasons for the relief sought, revise and alter such decree concerning the care, custody, and maintenance of the children and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require."

present case as the custody agreement in the former was expressly ratified in the decree, and the agreement was actually embodied into the decree in the latter. Even so, however, in *Semmes v. Semmes, supra*, the Virginia court did modify its former decree, in which the custody agreement had been expressly ratified, without proof of a change of condition. Full testimony was taken at the proceeding from which the modifying decree resulted; and when Mrs. Semmes (Ault) thereafter brought yet another motion to modify the decree, the Judge then held that she had not borne the burden of showing that the welfare of the child required that a change be made. On appeal, the Virginia Supreme Court of Appeals stated that the paramount issue was whether the evidence showed that the interest of the child would be best served by modification of the custody provisions in the second decree because of change of conditions and circumstances since its entry, and not because of a change in conditions since the entry of the first decree in which the custody agreement was ratified.

In *Andrews v. Geyer supra*, the custody agreement of the parties had been embodied into the original decree, and at a subsequent hearing it was found that the original decree had "worked satisfactorily" until the subsequent proceeding was instituted. There again the lower court modified the original decree by granting full custody to the respondent without proof of change of condition; and although the original decree was reinstated on appeal, the reversal was predicated upon the fact that the original decree had worked satisfactorily, and not upon a failure to prove change of condition.

In their brief, counsel for respondent repeatedly refer to the allegations and evidence of adultery on the part of the petitioner, from which it would appear that they have despaired of meeting the issue, *i.e.* whether the proceeding in the Virginia Court constituted a true adjudication on the merits. It would appear that by constantly emphasizing this matter, which is wholly irrelevant to the question involved,

counsel hope to influence the consideration of the case. Aside from the fact that such matter is wholly irrelevant and is included in disregard of Rule 40 (h) 5 of this Court, the matter has twice been fully considered and weighed along with the other evidence from which a determination of the best interest of the children could be made, and on both occasions it was concluded that the young children should spend most of the year with their mother. As pointed out in petitioners brief in main, the Judge of the Juvenile and Domestic Relations Court has exclusive jurisdiction in custody matters, and necessarily by his specialized experience becomes an expert in the field. In light of this experience and after having heard testimony for several days, having had the opportunity to observe the witnesses, and having heard the full arguments of counsel, he was in the best position to make a determination of that which was in the best interest of the children; and he determined that custody should be with their mother.

By the same token, upon appeal to the Court of Common Pleas, Judge Grimball, with all the evidence before him, affirmed the decree of the trial judge in every respect except that he gave Herman Ford custody during the summer months rather than leaving it to the parties to "work out a provision for the defendant to have the children during a portion of their summer vacation ***" (R. 27, 187-188). These two orders are the only orders that have resulted from a determination of what was in the best interest of the children based upon all the evidence; and these are the orders in the face of which respondent asserts that the result of the respondent being awarded custody "probably would be reached under a proper application of South Carolina Law to the facts of this case." (Resp's. Br. 25)

III

Writ Of Certiorari Was Properly Issued.

In their brief counsel for the respondent deny that the question involved is that presented in the petition for writ of certiorari and the petitioner's brief, and, in effect, repudi-

ate their own brief in opposition to petition for certiorari wherein they too stated the question to be whether the "dismissed agreed" order of the Virginia court was entitled to full faith and credit in South Carolina. In the decision of the South Carolina Supreme Court, which counsel for the respondent now say does not raise a substantial federal question, it is expressly stated (R. 205):

> "If the respondent here had instituted in the Courts of Virginia the action commenced by her in the Courts of this State, the appellant could have successfully interposed a plea of *res judicata* as a defense to said action. Since the judgment entered in the Virginia Court by agreement or consent is *res judicata* in that State, it is *res judicata* and entitled to full faith and credit in this State. We are required under Art. IV, Sec. 1 of the Constitution of the United States to give the same faith and credit in this State to the 'dismissed agreed' order or judgment as 'by law or usage' the Courts of Virginia would give to such order or judgment."

Counsel for the respondent attempt to strengthen their argument that "The South Carolina court's consideration of the Virginia order—and the effect given it—constituted no more than an intermediate determination which was preliminary to the application of South Carolina law" (Resp's. Br. 23), by generous use of italics in quoting from the decision of the South Carolina Supreme Court. The quotation at page 24 of respondent's brief, which is contended to be the court's "application of South Carolina law", is obviously obiter dictum, however, and could not affect or have any bearing upon the federal question decided by the South Carolina court. We, therefore, submit that the argument contained in respondent's point *D* is factitious and requires no further comment or reply.

CONCLUSION

The petitioner earnestly submits that:

(a) The argument should be confined to the record;

(b) The judgment of the South Carolina Supreme Court

should be reversed for the reasons set forth in petitioner's main brief; and,

(c) Any further proceeding in the cause entitled *H. Aubry Ford v. Barbara Dale Ford*, now pending in the Supreme Court of North Carolina, not in conformity with the mandate of this Court should be enjoined.

Respectfully submitted,
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APPENDIX

Supreme Court of the United States

No. —— ,— October Term, 1961.

BARBARA D. FORD, Petitioner,

vs.

HERMAN A. FORD

ORDER

Upon Consideration of the application of counsel for the petitioner, and of the opposition thereto,

It Is Ordered that the execution and enforcement of the judgment of the Supreme Court of South Carolina be, and the same is hereby, stayed to and including January 15, 1962. In the event a petition for writ of certiorari is filed in this Court on or before January 15, 1962, this stay is to continue pending the action of the Court on such petition. Should the petition be granted, this stay is to continue pending the issuance of the mandate of this Court. In the event the petition for certiorari is not filed on or before January 15, 1962, or in the event the petition for certiorari is denied, this stay order shall expire automatically.

(S) FELIX FRANKFURTER
Associate Justice of the Supreme Court of the United States

Dated this 22nd
day of December, 1961.